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IN THE

Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL CO.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF ANTITRUST SCHOLARS FOR LEAVE TO FILE BRIEF AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF ANTITRUST SCHOLARS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Robert Pitofsky, Kenneth G. Elzinga, and Ernest Gellhorn ("*amici*") hereby move, pursuant to Rule 37 of this Court, for leave to file a brief as *amici curiae* in support of the petitions for writs of *certiorari* to the United States Court of Appeals for the Ninth Circuit. Counsel for the Petitioners have consented to the filing of this brief. Counsel for the Respondents has not.

Amici are professors of antitrust law or of economics at leading American law schools and universities. They research, teach, and write on antitrust law and the economics of industrial organization, and have an interest in the development and application of American antitrust law. In some cases *amici* have served in senior positions in the Antitrust Division of the United

States Department of Justice or the Federal Trade Commission, which are charged with enforcing the antitrust laws.

Counsel of Record Robert Pitofsky is the Joseph and Madeline Sheehy Professor in Antitrust and Trade Regulation Law and Dean Emeritus of the Georgetown University Law Center. Professor Pitofsky served as Chairman of the Federal Trade Commission between 1995 and 2001 and previously served as a Federal Trade Commissioner and as the Director of the FTC's Bureau of Competition. In 2002 Professor Pitofsky received the Miles W. Kirkpatrick Award for Lifetime FTC Achievement.

Kenneth G. Elzinga is the Robert C. Taylor Professor of Economics at the University of Virginia, where he specializes in the economics of industrial organization. He is the author of dozens of books and articles on antitrust economics, including four that have been cited with approval by this Court.[1] Professor Elzinga has taught economics to federal judges and been appointed a court-appointed expert to advise a district judge in antitrust litigation. *See In re Auction Houses Antitrust Litig.*, No. 00 Civ. 0648, 2000 WL 1840030 (S.D.N.Y. Dec. 13, 2000). He previously served as a Special Economic Assistant to the head of the Antitrust Division and has been retained as a consultant by both the Federal Trade Commission and the Antitrust Division in major merger cases.

Ernest Gellhorn teaches antitrust law at George Mason University, where he is a Professor of Law. Professor Gellhorn formerly served as the dean of the schools of law at Case Western Reserve University, the University of Washington, and Arizona

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[1] *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (citing Professor Elzinga's article with David E. Mills regarding testing for predation); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 636 n.8 (1981) (citing Professor Elzinga's 1976 book with William Breit on antitrust penalties); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 551 (1973) (citing Professor Elzinga's 1971 article on the economics of the American beer industry); and *Ford Motor Co. v. United States*, 405 U.S. 562, 582 (1972) (citing Professor Elzinga's 1969 article on antitrust remedies).

State University, and taught law at University of Virginia and Duke University. He was coeditor of George Mason's *Supreme Court Economic Review* and is the author of numerous articles on antitrust.

Amici recognize the important and procompetitive role that joint ventures play in the American economy and believe that the Ninth Circuit Court of Appeals has committed a fundamental error by imposing *per se* antitrust liability on just such a procompetitive joint venture. If allowed to stand, the Ninth Circuit's decision would be a unique precedent allowing courts to penalize firms that cooperate to bring consumers better products at lower prices without regard to the absence of actual competitive harm, thus undermining the entire purpose of the antitrust laws.

Amici believe their brief will provide the Court with relevant legal and factual information not already brought to the Court's attention by the parties. Specifically, the brief discusses (i) the role under this Court's precedents of the Federal Trade Commission's review of the challenged conduct in determining whether *per se* condemnation is appropriate; and (ii) the inconsistency of the Ninth Circuit's decision with this Court's precedents addressing the relationship between Section 7 of the Clayton Act and Section 1 of the Sherman Act. Neither issue is discussed in the petitioners' briefs. The brief also brings to the Court's attention additional facts regarding the importance of joint ventures, including work of prominent economists on this subject.

Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

Respectfully submitted,

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BRIEF OF ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

A. Factual Background. 1

B. The Decisions Below. 3

SUMMARY OF ARGUMENT 5

REASONS FOR GRANTING THE WRIT 8

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Context Of The Restraint When Assessing Whether To Apply The *Per Se* Rule 8

A. The Ninth Circuit Ignored This Court's Command That Summary Condemnation Is Appropriate Only Where The Likelihood Of Anticompetitive Effects Is Obvious. 8

B. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Views Of The Federal Antitrust Enforcers 12

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions Addressing The Relationship Between Section 7 Of The Clayton Act And Section 1 Of The Sherman Act. 15

III. This Case Is Of Great Importance Because Of The Critical And Procompetitive Role That Joint Ventures Play In The American Economy. 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases *Page*

Advocacy Organization for Patients and Providers v. Mercy Health Services, 987 F. Supp. 967 (E.D. Mich. 1997) 14

Arizona v. Maricopa Medical Society, 457 U.S. 332 (1982) 12

Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) 6, 9, 14, 15, 16, 17

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 6, 7, 15

California Dental Association v. FTC, 526 U.S. 756 (1999) 6, 9

Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) 11

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) 9, 11, 20

Dagher v. Saudi Refining, Inc., 369 F.3d 1108 (9th Cir. 2004) ..... *passim*

FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986) 8

Jacob Siegel Co. v. FTC, 327 U.S. 608 (1946) 9

NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 6, 10, 20

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 8

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) 6, 10

Pearl Brewing Co. v. Miller Brewing Co., Civ. No. SA-93-CA-205, 1993-2 Trade Cases (CCH) ¶70,370 (W.D. Tex. Mar. 31, 1993), *aff'd*, 52 F.3d 1066 (5th Cir. 1995) 14

United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964) 15, 16, 17, 19

Page

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 7, 15

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 12

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 11

White Motor Co. v. United States, 372 U.S. 253 (1966) 9

Statutes and Rules

Clayton Act § 7, 15 U.S.C. § 18 ..... *passim*

Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a 2

S. Ct. R. 10(c) 5

Sherman Act § 1, 15 U.S.C. § 1 ..... *passim*

Federal Trade Commission Administrative Materials

Federal Trade Commission, Press Release, *Shell, Texaco To Divest Assets To Settle FTC Charges* (Dec. 19, 1997), *available at* http://www.ftc.gov/opa/1997/12/ shell.htm. 3

In the Matter of General Motors Corp., 103 F.T.C. 374 (1984) 3, 13

In the Matter of Shell Oil Co., 125 F.T.C. 769, 774-77 (1998) (Administrative Complaint) 2, 3

In the Matter of Shell Oil Co., 125 F.T.C. 769, 777-93 (1998) (Decision & Order) 3

In the Matter of Shell Oil Co., Federal Trade Commission Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997) 3, 13

Other Materials *Page*

Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373 (1966) 10

Herbert Hovenkamp, ANTITRUST LAW ¶ 1908e (2002) 17

Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM. & MARY L. REV. 871 (1994) 19

Carl Shapiro and Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. ECON. PERSPECTIVES 113 (1990) 17, 19, 20

U.S. Dep't of Justice & Federal Trade Comm'n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at www.ftc.gov/os /2000/ 04/ftcdojguidelines.pdf ..... 16, 17, ... 18, 19

Gregory J. Werden, *Antitrust Analysis of Joint Ventures*, 66 ANTITRUST L.J. 701 (1997) 17

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici* appears in the accompanying motion.[1]

STATEMENT OF THE CASE

A. Factual Background.

This case addresses the antitrust treatment of the creation in 1998 of two related joint ventures. The first joint venture, called Equilon Enterprises, was created when Texaco, Inc. and Shell Oil Co. contributed their assets used in the refining and marketing of petroleum in the midwestern and western United States. The second joint venture, called Motiva Enterprises, was created when Texaco and Saudi Refining, Inc. (which had previously created a gasoline refining and marketing joint venture called Star Enterprise) and Shell contributed their assets used in the refining and marketing of petroleum in the eastern United States. Shell owns 56% of Equilon and 35% of Motiva; Texaco owns 44% of Equilon and 32.5% of Motiva; and Saudi Refining owns 32.5% of Motiva. *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1111-12 (9th Cir. 2004).

Although the joint ventures combined the refining and marketing operations of Shell and Texaco, the parties to the joint ventures agreed that Equilon and Motiva would continue to sell under both the Shell and Texaco brands because the brands appealed to different customers, with Texaco customers tending to be "more blue-collared and rural than Shell customers, who are more affluent and urban." *Id.* at 1112. A single individual at each joint venture was responsible for setting a coordinated price for the two brands. *Id.* This decision to charge the same price for both brands (within a given geographic area) was an integral element of the joint ventures, developed "right from the start or near to the

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[1] Counsel for *amici* states that no counsel for a party authored this brief in whole or in part. Visa U.S.A. has made a monetary contribution to the preparation and submission of this brief.

very start of the alliance" and part of a plan to "produce and promote both brands more competitively." *Id.*

As the court of appeals concluded, the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." *Id.* at 1111. Not only would the joint ventures, rather than Shell and Texaco, control the pricing and promotion of gasoline, but after contributing their refining and marketing assets to the joint ventures, both Texaco and Shell agreed that they would not compete with the joint ventures they had created. *Id.*

The plaintiffs have never claimed that the joint ventures were mere shams to cover a naked price fixing agreement. *Id.* at 1126 (dissenting opinion). The court of appeals recognized that the joint ventures involved "collective assumption of risk and resource pooling," and that through these collective efforts Shell and Texaco believed that they could obtain synergies and cost efficiencies of up to $800 million per year. *Id.* at 1111-12.

Because the joint ventures involved the acquisition of assets they were reportable under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, and the Federal Trade Commission (the "FTC") conducted a full investigation and review of their likely competitive effects. After a multi-month review in collaboration with the Attorneys General of California, Hawaii, Oregon, and Washington, the FTC concluded that unless restructured the joint ventures would likely harm competition in seven relevant product and geographic markets, including markets for gasoline in San Diego and Oahu. *In the Matter of Shell Oil Co*, 125 F.T.C. 769, 774-77 (1998) (Administrative Complaint).[2]

The FTC was fully cognizant of the fact that Shell and Texaco had agreed that they would no longer compete in the retail sale of

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[2] Commissioner Azcuenaga dissented in part, concluding that there was no reason to believe that the joint ventures, if consummated, would harm competition in any market other than the refining of asphalt in Northern California. 125 F.T.C. at 812 (Separate Statement of Commissioner Mary L. Azcuenaga Concurring in Part and Dissenting in Part).

gasoline and that the joint ventures – rather than their parents – would control the pricing and marketing of the joint ventures' products. Although some manufacturing joint ventures are structured to supply product back to their parents for sale, and thus do not eliminate pricing competition, *see, e.g.*, *In the Matter of General Motors Corp.*, 103 F.T.C. 374 (1984) (manufacturing joint venture between General Motors and Toyota), that was not the case here. The FTC specifically recognized that the effect of the joint venture would be to "eliminat[e] direct competition in the terminaling and wholesale and retail sales of gasoline and diesel fuel," *Shell Oil*, 125 F.T.C. at 777 (Administrative Complaint ¶ 37), and treated the transaction as "reduc[ing] the six competitors to five" in local gasoline distribution. *In the Matter of Shell Oil Co.*, Federal Trade Commission Analysis to Aid Public Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997).

In order to resolve the FTC's competitive concerns, Shell and Texaco, without admitting liability, entered a consent decree requiring them to divest assets in the seven challenged markets to restore any competition lost as a result of the creation of the joint ventures. 125 F.T.C. at 777-93 (Decision & Order).[3] The divestitures required by the consent decree fully "alleviate[d] the alleged competitive concerns arising from the Joint Venture." 62 Fed. Reg. at 67,869.

B. The Decisions Below.

The plaintiffs, on behalf of a putative class of 23,000 Shell and Texaco service station owners, challenged the creation of the joint ventures as an unlawful price fixing scheme. Plaintiffs disclaimed any reliance on the traditional rule of reason standard applied to most agreements under the antitrust laws and rested their entire claim on either the *per se* rule or a "quick look" theory of liability. 369 F.3d at 1113.

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[3] The four state Attorneys General entered similar consent decrees with the parties to address their competitive concerns. *See* Federal Trade Comm'n, Press Release, Shell, Texaco To Divest Assets To Settle FTC Charges (Dec. 19, 1997), *available at* http://www.ftc.gov/opa/1997/12/shell.htm.

The district court granted summary judgment to the defendants. As the Ninth Circuit summarized its decision:

> The court concluded – relying on the detailed and costly negotiations leading up to the creation of the joint ventures – that Equilon and Motiva were plainly not "fly-by-night" operations designed to cover up an elaborate price-fixing scheme. Moreover, the court found that Motiva and Equilon produced sufficient efficiencies and were sufficiently integrated to constitute indisputably legitimate joint ventures under either the *per se* rule or a "quick look" analysis. Finally, the district court concluded that, because every joint venture "must, at some point, set prices for the products they sell" (citation omitted), a theory which made it illegal for a joint venture to fix prices of its various brands would "act as a *per se* rule against joint ventures between companies that produce competing products."

Id. at 1114.

The Ninth Circuit reversed in a split decision. The decision ignored the Federal Trade Commission's analysis and conclusion that the joint ventures as restructured would not harm competition, and instead condemned the joint pricing of gasoline sold by the ventures as *per se* unlawful price fixing.

The majority placed great weight on the fact that the joint venturers had not established that it was necessary to set a *single* price for the Shell and Texaco brands, noting that they found it "significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." *Id.* at 1122. The *per se* rule was therefore applicable, the court held, because the joint venturers had "failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the venture's legitimate efforts to produce better products or capitalize on efficiencies." *Id.*

The court recognized that "when two competing companies agree to merge . . . they generally agree to adopt a uniform pricing scheme" and that the "Supreme Court has permitted such agreements." *Id.* at 1117-18. But the majority distinguished the merger situation, believing that in a merger two firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one." *Id.* at 1118. The joint ventures were different, the court held, because Equilon and Motiva would be setting the price of "two . . . distinct product brands." *Id.* at 1124. The "analysis would be different," the court noted, if it had "confronted a joint venture in which former competitors . . . . agreed to merge their product lines into one collective brand." *Id.* The court did not discuss the FTC's merger analysis or afford any weight to the FTC's conclusion that the joint ventures as restructured pursuant to the consent decree would not harm competition.

Judge Fernandez dissented. Clearly dumbfounded by the majority's reasoning, he wrote:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services? I am at a loss for an answer to that question, and nothing written about this case to date imparts additional wisdom or better information.

Id. at 1127.

SUMMARY OF ARGUMENT

This court should grant the petitions for writs of *certiorari* because the United States Court of Appeals for the Ninth Circuit has "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

This Court made clear in *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999), that summary condemnation of an agreement among competitors is appropriate only where "an observer with even a rudimentary understanding of economics" would conclude that the agreement has an anticompetitive effect. Because the Federal Trade Commission concluded after a lengthy review that the challenged agreements are not likely to lessen competition, the Ninth Circuit's decision cannot be squared with the requirements of *California Dental*. Nor can the decision be squared with this Court's other precedents refusing to apply the *per se* rule to the conduct of legitimate joint ventures even where the challenged conduct would otherwise be *per se* unlawful. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) (henceforth "*BMI*"); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85 (1984); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985).

The Ninth Circuit would not have committed this fundamental error if it had followed this Court's command that the views of the federal antitrust enforcers should be considered in determining whether the *per se* rule applies. In *BMI* this Court recognized that the federal enforcers' review and approval of the challenged conduct was "a unique indicator that the challenged practice may have redeeming competitive virtues," and held that it was error for the court of appeals to "have ignored it completely in analyzing the practice." 441 U.S. at 13. While the views of the federal antitrust enforcers do not bind the courts in subsequent litigation, the Ninth Circuit failed even to discuss or analyze the impact of the Federal Trade Commission's review, and in so doing it not only demonstrated disregard for the conclusions of an expert federal agency, it ignored the requirements of this Court's precedent.

The Ninth Circuit's *per se* condemnation of the agreement also conflicts with this Court's teaching on the relationship between Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 1 of the Sherman Act, 15 U.S.C. § 1. There are no *per se* rules under Section 7; rather, the statute requires an examination of the facts of the specific acquisition in question to determine the likely impact on competition. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22 (1962). Yet Section 7 also sets a

tougher substantive standard of legality; an acquisition that does not violate Section 7 cannot violate Section 1. *See id.* at 328-29; *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963) ("not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act"). Because the challenged conduct was subject to review under both Section 7 and Section 1, *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 167-68 (1964), the Ninth Circuit's summary condemnation under the *per se* rule stands the relationship between Section 7 and Section 1 on its head. The Ninth Circuit's effort to distinguish this case from the analysis applied in a merger because in a merger firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one," 369 F.3d at 1118, is wrong as a factual matter and finds no support in the precedents of this or any other court.

This is not a case where joint venturers agreed to fix prices or otherwise eliminate competition on their own products sold outside the joint venture. Rather, this agreement on pricing was a fundamental element of the creation of the joint ventures, and is no different from the agreement inherent in *every* acquisition that the acquiring firm will control the acquired firm's pricing after closing the transaction. There is thus no basis to apply a *per se* rule instead of the fact-based analysis required in the merger context.

Finally, the importance of the question presented in the petitions for writs of *certiorari* cannot be gainsaid. Joint ventures have become commonplace because they provide the efficiencies needed to compete successfully in ways that are otherwise unattainable. These efficiencies and the enhanced competition that they facilitate benefit consumers, and thus serve the fundamental consumer welfare goal of the antitrust laws. The Ninth Circuit's decision undermines the very purpose of the antitrust laws by permitting the imposition of treble damages under a *per se* rule even where the joint venture and its conduct are procompetitive and benefit consumers.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Context Of The Restraint When Assessing Whether To Apply The *Per Se* Rule.

The Ninth Circuit's decision is a throwback to the days when the *per se* rule was applied to all agreements in any way related to price without regard to their economic context. The court of appeals' fundamental misconception of the role of the *per se* rule can be seen in its conclusion that "it does not matter whether the particular application of the *per se* rule appears inefficient or unfair." 369 F.3d at 1117.[4] In fact, this Court has made clear that the *per se* rule is not to be applied to "restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986).

A. The Ninth Circuit Ignored This Court's Command That Summary Condemnation Is Appropriate Only Where The Likelihood Of Anticompetitive Effects Is Obvious.

The examination of actual competitive effects under a rule of reason analysis may be avoided only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on

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[4] The Ninth Circuit cited *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), for the proposition that "[t]he Court has consistently held that the injustice of the rule's broad and uniform application must be addressed to Congress, not the judiciary." 369 F.3d at 1117. But this Court held no such thing in *Professional Engineers*, a case in which it applied the rule of reason, not the *per se* rule. 435 U.S. at 695 (restraint on competitive bidding "must be justified under the Rule of Reason"). Rather, the Court held that the Sherman Act did not recognize arguments that competition itself was an evil to be avoided, and that any exemptions to the Sherman Act were to be sought from Congress, not the courts. *Id.* at 692.

customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). By applying the *per se* rule, the Ninth Circuit necessarily concluded that the Federal Trade Commission – which approved the joint venture after a lengthy review – must have lacked the required "rudimentary understanding of economics." The court of appeals' disregard for the economic analysis of FTC, whose "expert opinion" this Court has held "is entitled to great weight," *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 614 (1946), reflects its fundamental misunderstanding of the role of the *per se* rule.

The Ninth Circuit characterized the agreement among the joint venturers that Equilon and Motiva would each charge a single price as a "naked" price fixing agreement subject to *per se* condemnation. 369 F.3d at 1124. This conclusion cannot be reconciled with this Court's precedents, which reject an "overly simplistic and often overbroad" inquiry limited to "whether two or more potential competitors have literally 'fixed' a 'price.'" *BMI*, 441 U.S. at 8-9. A "naked restraint" is one "with no purpose except stifling competition," *White Motor Co. v. United States*, 372 U.S. 253, 263 (1966), and *per se* condemnation is reserved for conduct that is "plainly anticompetitive" and likely to have no "redeeming virtue." *BMI*, 441 U.S. at 9. The *per se* rule has no place when considering an agreement among joint venturers to set the price of a joint venture's output.

The economic integration that accompanies a joint venture holds the promise of better products or lower prices, and a "necessary consequence" of the sale of the joint venture products is that its price must be established. *BMI*, 441 U.S. at 21. Accordingly, there is no *per se* violation where the joint venture sets only the price of products that it manufactures and sells, rather than products sold by the parents. *Id.* at 9. "When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." *Id.* Similarly, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984), this Court contrasted "horizontal price fixing which [is] is thought so inherently anticompetitive that [it] is illegal *per se* without inquiry into the harm it has actually caused," with "joint ventures," which are "judged under a rule of reason"

because they "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *See generally* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 474 (1966) (*per se* analysis is improper if the restraint "accompanies a contract integration" and "is ancillary to the contract integration").

This Court's decisions in two other joint venture cases involving conduct normally condemned under the *per se* rule similarly show the Ninth Circuit's departure from the law established by this Court. In *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the Court was faced with a challenge to an NCAA rule limiting the number of college football games that could be broadcast on television. Although an output limitation is "ordinarily condemned as a matter of law under an 'illegal *per se* approach,'" *id.* at 100, the Court applied the rule of reason because the restriction was part of a joint effort that was designed to – and did – "enhance competition." *Id.* at 103.[5] The Court similarly rejected application of the *per se* rule in the joint venture context to group boycotts in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). The "boycott" in *Northwest Wholesale* occurred by operation of a membership rule for a wholesale purchasing cooperative that permitted participating retailers to "achieve economies of scale" and "compete more effectively." *Id.* at 295. *Per se* treatment was inappropriate because membership rules of the type challenged allowed the cooperative "to function effectively" and because, unless the cooperative had market power, "the conclusion that [the rule] is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296.

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[5] The restriction on output in *NCAA* was nevertheless condemned under the rule of reason because the restriction on output was not a restriction on the joint venture's output, but that of its members. *See* 468 U.S. at 113 ("The NCAA does not, however, act as a selling agent for any school or for any conference of schools."). Its holding regarding the ultimate legality of the conduct is thus readily distinguishable.

In concluding that the joint venturers' pricing was not "necessary" to the operation of the joint venture and therefore subject to *per se* condemnation, the Ninth Circuit found it "significant that the defendants here did not simply consolidate the pricing decisions within the joint ventures – they *unified* the pricing of the two brands from the time the alliance was formed by designating one individual in each joint venture to set a single price for both brands." 369 F.3d at 1122. The court of appeals did not find it "rational" for the venturers to have ignored "different reputations and customer bases" by setting a single price. *Id.* Indeed, the Ninth Circuit noted that it might have reached a different conclusion if the defendants had "decided to charge the same price for Texaco and Shell gasoline after conducting separate price analyses for each brand, or had they come forward with persuasive evidence that the setting of a single, fixed price was important to accomplishing the legitimate aims of the joint ventures." *Id.* at 1124.[6] This Court's precedents make plain, however, that whether the joint venturers picked the same prices for the two brands or different prices, and whether that price was reasonable or unreasonable, is irrelevant to the question of whether the *per se* rule applies. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (*per curiam*) ("It is no excuse that the prices fixed are themselves reasonable."); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (reasonableness of price set by agreement is irrelevant).

The factors described by the Court in *BMI*, *Copperweld*, *NCAA*, and *Northwest Wholesale* – which do not include how the

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[6] It is unclear whether the Ninth Circuit would have been satisfied had Equilon and Motiva simply set different prices for the two brands, or whether in its view Shell should have set the price for the Shell brand gasoline sold by the joint ventures and Texaco should have set the price for Texaco brand gasoline. If the latter, because Shell holds a minority stake in Motiva and Texaco owns a minority stake in both Equilon and Motiva, an agreement between the parents and a joint venture subsidiary that they do not control might itself be unlawful vertical price fixing. *See Copperweld*, 467 U.S. at 767 (leaving open "under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own").

price is set or whether it is reasonable – required application of the antitrust rule of reason in this case, not the *per se* rule. The joint venture allowed Equilon and Motiva to "compete more effectively." The only joint pricing was of the joint venture's output, a price that had to be set in order for the joint venture to "function effectively." And there was – and could be – no claim that the joint ventures had market power of antitrust concern.

The joint venture cases in which this court has applied the *per se* rule are readily distinguishable. In *Arizona v. Maricopa Medical Society*, 457 U.S. 332, 336 (1982), the "foundations" created by doctors that fixed maximum prices for service were "not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." Rather, "[t]he agreement under attack [was] an agreement among hundreds of competing doctors concerning the price at which each will offer his own services to a substantial number of consumers." *Id.* at 336-37. In *United States v. Topco Associates, Inc.*, 405 U.S. 596, 598 (1972), the Court applied the *per se* rule to a market allocation agreement among participants in a private label grocery joint venture where "[e]ach of the member chains operates independently; there is no pooling of earnings, profits, capital, management, or advertising resources" and where "[t]he association does not itself own any manufacturing, processing, or warehousing facilities, and the items that it procures for members are usually shipped directly from the packer or manufacturer to the members." In contrast, there was no dispute that Equilon and Motiva involved "collective assumption of risk and resource pooling." 369 F.3d at 1111-12.

B. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Requiring Consideration Of The Views Of The Federal Antitrust Enforcers.

The Federal Trade Commission reviewed the creation of the joint ventures and found that, as restructured, they do not harm competition. There was no doubt that the FTC fully understood the nature of the joint venture and that it would eliminate price competition between Shell and Texaco. *See In the Matter of Shell Oil Co.*, Federal Trade Commission Analysis to Aid Public

Comment, 62 Fed. Reg. 67,868, at 67,871 (Dec. 30, 1997). Although some manufacturing joint ventures do not eliminate price competition because they supply product back to the joint venturers for their own pricing, marketing, and sale, *see, e.g.*, *In the Matter of General Motors Corp.*, 103 F.T.C. 374 (1984), that was not the case here. The FTC nevertheless approved the joint ventures as restructured under its consent decree.

This Court's precedent required that the FTC's conclusions be considered by the Ninth Circuit, a mandate that the court of appeals ignored. The Ninth Circuit's failure to consider the views of the FTC and the Commission's efforts to restructure the joint ventures in order to preserve competition should not be countenanced.

BMI, is this Court's seminal case addressing the antitrust treatment of joint ventures. There the Court was called upon to address a private challenge to the blanket licensing policies of ASCAP and BMI, two music licensing organizations. The plaintiff argued that the blanket licenses operated as price fixing agreements among thousands of copyright holders and were thus subject to condemnation under the *per se* rule. The Court rejected application of the *per se* rule, however, in part because ASCAP's conduct had been reviewed by the Antitrust Division of the Department of Justice and modified in response to the Antitrust Division's demands through a consent decree.

The Court held in *BMI* that while review by the Antitrust Division did not immunize the conduct, the review by federal antitrust enforcers militated against summary condemnation under the *per se* rule and that the court of appeals had erred in ignoring it:

> Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. . . . But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further

> consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice.

441 U.S. at 13.[7] In this case, the Ninth Circuit merely noted that the "Federal Trade Commission and several State Attorneys General approved the formation of the joint ventures, subject to modifications demanded by both the federal agency and the various Attorneys General." 369 F.3d at 1111. But the court of appeals nowhere analyzed or discussed the significance of this review, in violation of this Court's command in *BMI*.[8]

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[7] Indeed, the Court recognized that it was obligated to consider the Antitrust Division's views as well. *See* 441 U.S. at 16 ("Of course, we are no more bound than is CBS by the views of the Department of Justice . . . . But while we must independently examine this practice, [those views] should caution us against too easily finding blanket licensing subject to *per se* invalidation.").

[8] Other lower courts, in contrast, have recognized that when the federal antitrust enforcers have reviewed and approved a transaction, their conclusions are entitled to careful consideration. *See Advocacy Org. for Patients & Providers v. Mercy Health Servs.*, 987 F. Supp. 967, 974 (E.D. Mich. 1997) (holding that it is a "telling sign that the merger raises no significant anticompetitive concerns" where neither federal agency charged with antitrust enforcement challenges the merger); *Pearl Brewing Co. v. Miller Brewing Co.*, Civ. No. SA-93-CA-205, 1993-2 Trade Cases (CCH) ¶70,370 (W.D. Tex. Mar. 31, 1993), *aff'd*, 52 F.3d 1066 (5th Cir. 1995) (in considering Section 7 challenge to merger, "[t]he fact that [the federal agencies], who presumably have obtained a significant measure of expertise in these matters, have raised no objection to the acquisition is entitled to some consideration by the Court").

In *BMI* this Court looked not only to the Justice Department's consent decree, but also to a brief *amicus curiae* filed by the United States confirming that it "remains of the view" that application of the *per se* rule was inappropriate. *BMI*, 441 U.S. at 15. *Amici* would therefore urge the Court to solicit the views of the United States and of the Federal Trade Commission in its consideration of the petition for writ of *certiorari*.

II. The Ninth Circuit's Decision Conflicts With This Court's Decisions Addressing The Relationship Between Section 7 Of The Clayton Act And Section 1 Of The Sherman Act.

Section 7 of the Clayton Act, 15 U.S.C. § 18, outlaws acquisitions the effect of which "may be substantially to lessen competition." But there are no *per se* rules under Section 7; rather, the statute requires an examination of the facts surrounding the specific acquisition in question to determine the likely impact on competition. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 320-22 (1962). Yet Section 7 also sets a tougher substantive standard of legality than Section 1 of the Sherman Act, 15 U.S.C. § 1. An acquisition that does not violate Section 7 cannot violate Section 1, for "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act." *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-29 (1962); *see also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 355 (1963) ("not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act").

In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 167-78 (1964), this Court held that the creation of a new joint venture corporation is subject to review under both Section 7 of the Clayton Act and Section 1 of the Sherman Act. Given the relationship between Section 7 and Section 1, *Penn-Olin* bars *per se* condemnation of the creation of a new joint venture subject to Section 7 without regard to the absence of anticompetitive effects. Thus, in analyzing the *Penn-Olin* joint venture, this Court remanded to the district court for a fact-specific consideration of whether joint venture violated Section 7, but *rejected* the dissent's contention that the joint venture agreement was a *per se* violation

of Section 1, and indeed found no violation of Section 1 at all. *Penn-Olin*, 378 U.S. at 177-78.[9]

The evaluation of a joint venture under the tougher substantive standard of Section 7 requires a detailed evaluation of market conditions to determine likely competitive effects. *Penn-Olin*, 378 U.S. at 177.[10] By summarily condemning under the *per se* rule a joint venture that was lawful under Section 7, the Ninth Circuit has turned on its head the relationship between Section 7 and Section 1 set forth by this Court in *Penn-Olin*.

The court of appeals' refusal to analyze the joint ventures using merger standards is also inconsistent with the approach of the federal antitrust enforcers. *See* U.S. Dep't of Justice & Federal Trade Comm'n, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (hereinafter *JV Guidelines*). Under the *JV Guidelines*, a joint venture will be analyzed using merger analysis standards where it involves an efficiency-enhancing integration, ends all competition between the joint venturers in that market, and does not terminate within a limited period by its own specific and

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[9] The Court made the same point in *BMI*, noting that "[m]ergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard." 441 U.S. at 23.

[10] The Court in *Penn-Olin* instructed the trial court to consider a long list of factors in its Section 7 analysis, including:

> the number and power of the competitors in the relevant market; the background of their growth; the power of the joint venturers; the relationship of their lines of commerce; the competition existing between them and the power of each in dealing with the competitors of the other; the setting in which the joint venture was created; the reasons and necessities for its existence; . . . the potential power of the joint venture in the relevant market; . . . and such other factors as might indicate potential risk to competition in the relevant market.

378 U.S. at 177.

express terms. *Id.*, § 1.3.[11] Indeed, the *JV Guidelines* use an example to illustrate the operation of Section 1.3 that is drawn from the creation of Equilon. *JV Guidelines*, Example 1 (hypothetical with fact pattern where "[t]wo oil companies agree to integrate all of their refining and refined product marketing operations" but "maintain separate crude oil production operations").

Regardless, it would make no sense to apply the harsher *per se* test to a joint venture that is something short of a merger. As leading economists have noted, "If the *per se* rule were applied to joint ventures, a paradoxical result would emerge: ventures would be treated more harshly than mergers, although mergers clearly have greater potential for diminishing competition." Carl Shapiro and Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. ECON. PERSPECTIVES 113, 119 (1990).

This is not a case where joint venturers agreed to fix prices or otherwise eliminate competition on their own products sold outside the joint venture; the agreement on price relates only to the joint venture's own products. *Cf.* 11 Herbert Hovenkamp, ANTITRUST LAW ¶ 1908e (2002) (there is no "*per se* unlawful price fixing" where "the venturers [do] not enter into any agreement to fix the price of their nonventure output"). In this regard the agreement condemned by the Ninth Circuit as *per se* unlawful is indistinguishable from the agreement inherent in *every* acquisition that the acquiring firm will control the acquired firm's pricing after closing the transaction. *BMI*, 441 U.S. at 23.

The court of appeals held that the fact-based, rule of reason analysis applied in merger cases was inapplicable because the joint ventures would be setting the price of "two . . . distinct product

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[11] *See generally* Gregory J. Werden, *Antitrust Analysis of Joint Ventures*, 66 ANTITRUST L.J. 701, 715-16 (1997) (endorsing similar test and noting that "[m]any transactions reasonably termed joint ventures by their participants have been treated as mergers under the antitrust laws (citing *Penn-Olin*, 378 U.S. at 167-82, *FTC v. Warner Communications, Inc.*, 742 F.2d 1156 (9th Cir. 1984), and *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989))).

brands," 369 F.3d at 1124, while in a merger the two firms "combine their product lines, or . . . eliminate the old product lines and create an entirely new one." *Id.* at 1118. The Ninth Circuit provided no citation to authority to justify its conclusion that the "analysis would be different," had it "confronted a joint venture in which former competitors . . . . agreed to merge their current product lines into one collective brand." *Id.* at 1124. The court of appeals' effort to distinguish the merger situation is wrong as a matter of fact – in many mergers the combined firm continues to sell under the brands of both the acquiring and acquired firms. Regardless, the Ninth Circuit cited no precedent for this distinction, and there is no support for it in the merger jurisprudence of this – or any other – court.

The Ninth Circuit's cramped approach to Section 7 analysis thus has the potential to cause chaos not only in the joint venture area, but also in the case of full-fledged mergers. If the Ninth Circuit's view stands, Daimler Benz's acquisition of Chrysler could have been condemned as a *per se* violation of the antitrust laws merely because Daimler and Chrysler agreed at the time of the merger that both brands would be continued but that prices would be set by the merged firm. The decision whether to apply the *per se* rule or the rule of reason does not turn on such arbitrary distinctions.

III. This Case Is Of Great Importance Because Of The Critical And Procompetitive Role That Joint Ventures Play In The American Economy.

The Federal Trade Commission and the Department of Justice noted in their *JV Guidelines* that "to compete in modern markets, competitors sometimes need to collaborate" and "[c]ompetitive forces are driving firms toward complex collaborations to achieve goals such as expanding into foreign markets, funding expensive innovation efforts, and lowering production and other costs." *JV Guidelines*, Preamble. Firms enter joint ventures "because realizing such benefits may require closer long-term relationships than arms-length market transactions and short-term contracts can provide." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114.

Because joint ventures provide the efficiencies needed to compete successfully in ways that are otherwise unattainable, they have become commonplace. This Court noted forty years ago that the economic role of joint ventures had "grown tremendously in the last score of years, having been spurred on by the need for speed and size in fashioning a war machine during the early forties," and that "[p]ostwar use of joint subsidiaries and joint projects led to the spawning of thousands of such ventures in an effort to perform the commercial tasks confronting an expanding economy." *Penn-Olin*, 378 U.S. at 169. Shapiro and Willig's 1990 study determined that "[m]ore than 50 production joint ventures aimed at U.S. production and involving at least one U.S. firm have been formed in each of the last few years, many including large, leading firms." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114. *See also* Thomas A. Piraino, Jr., *Reconciling Competition and Cooperation: A New Antitrust Standard for Joint Ventures*, 35 WM & MARY L. REV. 871, 873 (1994) (noting that "the number of new strategic alliances in the United States has nearly doubled in each of the last ten years").

Firms need clear guidance on the antitrust rules of the road before investing millions (or billions) of dollars in a joint venture. "[T]he possibility that an adverse court decision under the *per se* rule would lead to treble damages or to dissolution of a production joint venture under the *per se* rule may deter firms from forming a joint venture that could bring little anticompetitive risk and significant procompetitive efficiencies." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 119.[12] *See also* Robert Pitofsky, *Joint Venture Guidelines: Views from One of the Drafters*, Remarks before the ABA Section of Antitrust Law Workshop: Joint Ventures and Strategic Alliances: The New Federal Antitrust

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[12] Professors Shapiro and Willig went on to note that "since no case in the past decade has applied the *per se* rule to joint activity involving genuine economic integration of operations, and since so many ventures have been formed between rivals, it appears unlikely that the threat of running afoul of a *per se* ruling is *dramatically* chilling procompetitive collaboration." Shapiro and Willig, 4 J. ECON. PERSPECTIVES at 114. The Ninth Circuit's decision turns that conclusion upside down.

Competitor Collaboration Guidelines (Nov. 11& 12, 1999), *available at* http://www.ftc.gov/speeches/pitofsky/jvg991111.htm (noting that participants in the Federal Trade Commission's 1996 hearings on Global and High-Tech Competition identified joint ventures when asked what area of antitrust law was most uncertain and where the uncertainty led to the business community avoiding transactions that might be legal and efficient).

This Court has repeatedly recognized that joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively," *Copperweld Corp.*, 467 U.S. at 768, and that "a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." *NCAA*, 468 U.S. at 103. The chaos created by the Ninth Circuit's decision will return us to a time when the business community avoided procompetitive, efficiency-enhancing joint ventures because of fear of crushing treble damages imposed without regard to the absence of actual consumer harm. All consumers will be worse off if that comes to pass.

CONCLUSION

This Court should grant *certiorari* to reverse the decision of the Ninth Circuit.

Respectfully submitted,

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